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No. 91-1066

Supreme Court, U.S.

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**In The Supreme Court of the United States
October Term, 1991**

**YAMAHA CORPORATION OF AMERICA, AND
YAMAHA ELECTRONICS CORPORATION, U.S.A.,**
Petitioners

V.

**ABC INTERNATIONAL TRADERS, INC.
FARHAD LARIAN, AND ISAAC LARIAN,**
Respondents

**Petition For Writ Of Certiorari To The
United States Court Of Appeals For The Ninth Circuit**

**PETITIONERS' REPLY TO RESPONDENTS'
BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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INTRODUCTION

To open their Opposing Brief, Respondents ABC INTERNATIONAL TRADERS, INC., FARHAD LARIAN, and ISAAC LARIAN (collectively "ABC") claim that Petitioners YAMAHA CORPORATION OF AMERICA (YCA) and YAMAHA ELECTRONICS CORPORATION, USA (YEC) (collectively "Yamaha") made statements of fact in their Petition which were not the subject of District Court findings or are inconsistent with such findings. Notwithstanding ABC's assertion, the statements made by Yamaha in its Petition are all supported by the record or admitted by ABC below. More importantly, the statements challenged by ABC are not determinative of the issues before this Court.

I. YCA HAS STANDING TO CLAIM THAT THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE FRIENDSHIP TREATY AND PARIS CONVENTION

ABC's statement in footnote 5 of its Brief demonstrates that ABC misunderstands Yamaha's argument under the Treaty of Friendship, Commerce and Navigation, 4 U.S.T. 2063, T.I.A.S. 2863 (1953) (Friendship Treaty) and the Paris Convention for the Protection of Industrial Property, 21 U.S.T. 1628, T.I.A.S. 6293 (1967) (Paris Convention). Contrary to ABC's characterization, YCA is not attempting to rely on its status as a wholly-owned subsidiary of Yamaha Japan to claim rights given to foreign corporations under these Treaties, and then assert that it is independent from Yamaha Japan to permit it to maintain a trademark infringement action. Rather, YCA relies on the Friendship Treaty and *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176 (1981), as the authorities which define it as a U.S. company entitled to all the rights of any other U.S. company. If, however, YCA's separate corporate status continues to be ignored, and it is held to be the same as its foreign parent, then it should be entitled to avail itself of the Friendship Treaty and Paris Convention as a foreign corporation. Therefore, Yamaha's position is not inconsistent as ABC claims. Furthermore, as shown below, YCA as a domestic corporation has standing to assert its Treaty arguments.

A. Friendship Treaty

ABC's contention is incorrect that YCA, as a domestic company, has no standing to assert that the Ninth Circuit's decision conflicts with the Friendship Treaty. ABC argues that the Friendship Treaty's purpose of preventing discrimination is fully met when Yamaha Japan was permitted to incorporate YCA as a local subsidiary. This argument is plainly wrong because it only goes halfway. To prevent discrimination, local subsidiaries like YCA must also be accorded all the rights of any other domestic company, i.e., national treatment. The mere ability to incorporate here without national treatment, would not prevent discrimination. This Court in *Sumitomo*, 457 U.S. at 188, found that the Friendship Treaty assured national treatment as the best way to prevent discrimination. The Friendship Treaty accomplishes this by requiring that local subsidiaries be treated as independent domestic companies with all the rights and obligations of any other domestic company. Here, YCA was denied its statutory rights under §526 of the Tariff Act and §§32 and 42 of the Trademark Act because YCA is owned by a Japanese company. That is not national treatment, but pure and simple discrimination in direct conflict with the Friendship Treaty as construed by this Court. YCA has standing to assert that it is being denied national treatment which the Friendship Treaty and *Sumitomo* require.

ABC's argument also completely ignores Article XXII(3) of the Friendship Treaty which states in relevant part:

Companies constituted under the applicable laws and regulations *within the territories of either party* shall be deemed companies thereof and shall have their juridical status recognized within the territories of the other Party.

(emphasis ours)

Article XXII(3) of the Friendship Treaty and *Sumitomo* define YCA as a domestic company, and mandate that its domestic corporate status be recognized. However, the Ninth Circuit, in reliance on the conflicting Regulation, deemed YCA to be a

Japanese company because of its wholly-owned subsidiary status, and denied it the statutory rights granted by the express language of §§32 and 42 of the Trademark Act and §526 of the Tariff Act. YCA indeed has standing to challenge the Ninth Circuit's refusal to follow this Court's decision in *Sumitomo* and accord it the rights granted by the Friendship Treaty.

ABC's arguments on pages 8 through 11 of its Brief that YCA cannot be meaningfully independent from Yamaha Japan because of its subsidiary relationship to Yamaha Japan underscores YCA's point that its legal rights as a domestic company are being denied. ABC claims that YCA can never be independent of Yamaha Japan and that it "would be illogical to recognize a wholly-owned subsidiary as a separate independent entity entitled to independent rights under the Trademark Act as against genuine goods produced by the parent." ABC is thereby asserting that YCA is effectively a Japanese company.¹ There is no evidence to support ABC's contentions; neither Court made any inquiry on the issue of independence. That YCA's legal rights as a domestic company are being denied is the main thrust behind Yamaha's Treaty arguments. Article XXII(3) of the Friendship Treaty provides that YCA's juridical status as a domestic company shall be recognized. ABC's position that it should not be treated as a domestic company is contrary to the express language of the Friendship Treaty as construed by this Court in *Sumitomo*.

B. Paris Convention

Contrary to ABC's argument, YCA is not attempting to avail itself of the Paris Convention as a domestic company. The Ninth Circuit's decision leaves no doubt that YCA is being treated as a Japanese company in order to deny it the legal rights granted under the Trademark and Tariff Acts. If so, then it is entitled

1. ABC's position is inconsistent. First, ABC claims that YCA is a domestic company, and therefore, has no standing to invoke the Friendship Treaty or Paris Convention. Then, ABC is claiming that YCA cannot be independent of Yamaha Japan, its Japanese parent. YCA is either an American company or a Japanese company. It cannot be neither nor both.

to avail itself of the Paris Convention which requires national treatment of nationals of member countries. Under the Paris Convention, even Yamaha Japan, if it were the owner of the marks, could assert the rights granted under the Trademark Act and the Tariff Act as the Paris Convention gives it the same rights with respect to trademarks as domestic companies.² Therefore, if YCA is treated as a Japanese company as the Ninth Circuit has done, it must be accorded the rights of a domestic company by virtue of the Paris Convention. Unquestionably, Yamaha has standing to raise this argument.

II. THE NINTH CIRCUIT'S DECISION DISCRIMINATES AGAINST YCA ON THE BASIS OF ITS FOREIGN OWNERSHIP

The Ninth Circuit found that Yamaha had no rights under the Trademark Act, following its prior decision in *NEC Electronics v. Cal. Circuit ABCO*, 810 F.2d 1506 (9th Cir.), *cert. denied*, 484 U.S. 851 (1987), because *NEC* held that "federal trademark law affords no protection for a wholly-owned United States subsidiary of a foreign manufacturer against a rival company that imports and sells goods made by the foreign parent company." By so holding, the Ninth Circuit plainly found that Yamaha could not assert trademark rights because it is owned by Yamaha Japan, a foreign manufacturer. The Ninth Circuit's decision creates an exception to §32 of the Trademark Act that wholly-owned subsidiaries of foreign manufacturers like YCA do not enjoy the same legal rights under the statutes as other domestic companies solely because of foreign ownership. This is unjustified discrimination against a thirty year old domestic company like YCA.³

ABC argues that the Ninth Circuit found that YCA and Yamaha Japan were incapable of being independent from one another,

2. This is also true under the Friendship Treaty.

3. As stated in Yamaha's Petition, the discriminatory nature of the Ninth Circuit's decision is made clear by contrasting it to the Ninth Circuit's opposite result in an earlier decision in *Model Rectifier Corp. v. Takachiho International, Inc.*, 709 F.2d 1517 (9th Cir. 1983), *aff'g*, 220 U.S.P.Q. 508 (C.D. Cal. 1983).

and therefore, YCA could not assert its trademark rights. ABC's entire argument on pages 8 through 11 of its Brief on whether YCA is or could be independent from Yamaha Japan is unsupported by any evidence and simply begs the question of whether independence from Yamaha Japan is a prerequisite for YCA to enjoy the same rights under the Trademark Act and the Tariff Act as other domestic companies such as Model Rectifier. ABC assumes that such independence is necessary, whereas YCA argues that it is not. The Ninth Circuit's refusal to grant YCA its legal rights under the Trademark and Tariff Acts solely because of YCA's relationship to Yamaha Japan is contrary to the law and the obligations under the Friendship Treaty and the Paris Convention. Also, the assumption that YCA is not independent totally ignores its separate existence as a U.S. corporation with an active place of business in California for more than 30 years. ABC, therefore, does not confront Yamaha's argument, but merely assumes its inapplicability.

ABC's attempts, throughout its Brief, to paint Yamaha Japan as the owner of the marks because the trademark assignment from Yamaha Japan to YCA was somehow tainted, are dishonest. The District Court specifically found that the assignment was actual not purported as ABC argued. ABC did not appeal this finding and is therefore barred by *res judicata* from asserting otherwise.⁴

ABC's unsupported assertion that Yamaha Japan could never have brought a trademark infringement action against ABC is also not true and is not relevant to whether YCA is being discriminatorily denied its trademark rights because of foreign ownership. There was nothing preventing Yamaha Japan, when it owned the marks, from maintaining an action against ABC for

4. Furthermore, the ownership of trademarks is a matter of contract between the manufacturer and distributor. See, *A. Bourjois & Co. v. Katzel*, 260 U.S. 689 (1923); *International Armament Corp. v. Matra Manhurin International, Inc.*, 630 F. Supp. 741, 746 (E.D. Va. 1990); *Model Rectifier*, 220 U.S.P.Q. at 510; and *B&W Loudspeakers, Inc. v. 6th Avenue Electronics*, 729 F. Supp. 945 (S.D.N.Y. 1990).

trademark infringement since ABC did not purchase the goods from it. In fact, under §44 of the Trademark Act, the Friendship Treaty and Paris Convention, Yamaha Japan had the right to bring an action to enforce its U.S. trademark rights.

Moreover, ABC's statement that YCA could not maintain an action against ABC prior to the assignment is also legally incorrect. It has long been recognized that an exclusive distributor such as YCA, can maintain an action for trademark infringement.⁵ Therefore, YCA, as the exclusive U.S. distributor for 30 years, could have sued ABC for trademark infringement prior to the assignment of the "Yamaha" marks.

ABC's intimation that Yamaha Japan's assignment to YCA to take advantage of §526 was improper is incorrect. ABC claims that YCA is attempting to circumvent the substantive requirement of a statute, and therefore, its separateness should not be recognized. YCA is not attempting to circumvent the requirements of §526 of the Tariff Act or §42 of the Lanham Act, but is instead attempting to avail itself of the protection of such Acts. There is nothing illegal or improper about the assignment of the "Yamaha" marks to YCA. Property, such as trademarks, is transferred for many lawful business purposes, such as to take advantage of tax laws.⁶

ABC's hypothetical claim on pages 10 and 11 of its Brief that if YCA were permitted to exclude gray market products, that would pave the way for Yamaha Japan to conspire with YCA to commit antitrust violations is without any factual or legal support. In a similar case, this same argument was rejected by the court

5. See, *Quabaug Rubber Co. v. Fabiano Shoe Co., Inc.*, 567 F.2d 154, 159-60 (1st Cir. 1977); *Watson v. E. Leitz, Inc.*, 254 F.2d 777, 780 (D.C. Cir. 1958); *Avedis Zildjian Co. v. Fred Gretsch Mfg. Co.*, 251 F.2d 530, 532 (2d Cir. 1958); *Georg Jensen & Wendel, A/S v. Georg Jensen Handmade Silver, Inc.*, 111 F.2d 169, 172 (C.C.P.A. 1940); and *Osawa & Co. v. B & H Photo*, 589 F. Supp. 1163, 1179 (S.D.N.Y. 1984).

6. See, *B&W Loudspeakers, Inc. v. 6th Avenue Electronics*, 729 F. Supp. 945 (S.D.N.Y. 1990) (cases cited) and *International Armament Corp.*, 630 F. Supp. at 746 (assignment of trademarks to take advantage of §526 entirely proper).

after a thoughtful and painstaking analysis. See, *Osawa*, 589 F.Supp. at 1176-78. Furthermore, this speculative possibility is entirely irrelevant to whether YCA is being discriminated against because of its foreign ownership. Courts have noted that the trademark laws and a Customs Regulation are not the proper vehicles for addressing antitrust concerns since they fail to make the relevant legal inquiries, and have questioned it as unsound.⁷ The Ninth Circuit's reliance on the Regulation incorrectly assumes that a violation of the antitrust laws has occurred without the benefit of any evidence other than the parent-subsidiary relationship and the Regulation.

III. THE NINTH CIRCUIT'S DECISION THAT THE REGULATION PRECLUDES A PRIVATE CAUSE OF ACTION TO YCA CONFLICTS WITH DECISIONS OF THIS COURT AND OF OTHER CIRCUITS

A. *Kmart* Did Not Decide That the Regulation Applied to Private Causes of Action

ABC asserts that this Court's decision in *Kmart* held that the Regulation applies to private causes of action under §526 of the Tariff Act involving gray marketing.⁸ ABC's further statement that this Court in *Kmart* affirmed and adopted Customs' interpretation of the Tariff Act for private causes of action is overreaching.

7. *Olympus Corp. v. United States*, 792 F.2d 315, 319-20 (2d Cir. 1986); *Coalition to Preserve the Integrity of American Trademarks v. United States*, 790 F.2d 903, 915-6 (D.C. Cir. 1986), *rev'd on other grounds*, 108 S. Ct. 1811 (1988); *Osawa*, 589 F. Supp. at 1178.

8. ABC's statement on page 13 of its Brief that this Court unanimously upheld the Regulation is incorrect. Justices Scalia, Rehnquist, O'Connor and Blackmun dissented from Justice Kennedy's Opinion. Justice Scalia's dissent stated that:

In my view, subsections (c)(1) and (c)(2) of the regulation are also in conflict with the clear language of 526(a). I, therefore, decline to join parts IIB and III of Justice Kennedy's opinion and dissent from that part of the judgment upholding subsections (c)(1) and (c)(2).

Kmart did not hold that Customs' interpretation is applicable to private actions under §526(c). *Kmart* only concerned itself with the reasonableness of Customs' enforcement under the Regulation giving no direction on the scope of the statute, its conflict with the Trademark Act and Treaty obligations, or the Regulation's applicability to private causes of action.

ABC's statement in footnote 8 that a court should give deference to Customs' interpretation of the statute is not applicable to private actions under §526. Deference may be given to Customs' interpretation when it is applying the Regulation in the course of its duties whether to exclude gray market products. This deference ends when it conflicts with Statutes and Treaties as is the case here.

ABC's argument on page 14 of its Brief that the Ninth Circuit did not deny YCA a private cause of action under §526 is incorrect. Citing *Kmart* as authority that no private Tariff Act cause of action exists for wholly-owned subsidiaries of foreign corporations, ABC contends that the court merely held that YCA could not prosecute a private action independent of its parent. ABC argues that the court's holding, though not explicit on this point, "was expressed as a validation of Customs' interpretation" of the Regulation. *Kmart* plainly did not address the scope of §526 to private actions under the statute. Nor did it address whether Customs' interpretation was applicable to private causes of action. *Kmart* only held that for Customs' enforcement purposes, the Regulation was a reasonable interpretation of the statute.

B. The Ninth Circuit's Decision Conflicts With This Court's *Morrill* Decision and Decisions of The Second, D.C., and Federal Circuits

ABC misunderstands Yamaha's contentions regarding the Ninth Circuit's conflict with *Morrill v. Jones*, 106 U.S. 466 (1883). The Ninth Circuit held that the Regulation precluded YCA from an action under §§32 and 42 of the Trademark Act and §526 of the Tariff Act. *Morrill* held that a Regulation cannot take away legal rights granted under a statute. The Ninth Circuit's decision

relies only on the Regulation to deny YCA its statutory rights under the Trademark and Tariff Acts solely because it is a wholly-owned subsidiary of Yamaha Japan. There is nothing in either §§32 or 42 of the Trademark Act or §526 of the Tariff Act which denies a wholly-owned subsidiary of a foreign corporation these rights. Therefore, the Ninth Circuit's decision conflicts with *Morrill* because it uses the Regulation to strip away or deny the rights granted under the statutes.

ABC claims, without explanation, that *Kmart* resolved any possible conflict between the Ninth Circuit's decision here and both *A. Bourjois & Co., Inc. v. Katzel*, 260 U.S. 689 (1923) and *Vivitar Corp. v. United States*, 761 F.2d 1552 (Fed. Cir.), cert. denied, 474 U.S. 1055 (1985). ABC does not deny a conflict with these two cases. Yamaha asserted that the Ninth Circuit's decision conflicted with *Bourjois* because the Ninth Circuit failed to recognize the territoriality of trademark protection. *Kmart* did not address the threshold question of territoriality.

Yamaha cited *Vivitar* for the proposition that a private cause of action exists under §526 regardless of the Regulation. As shown above, *Kmart* did not decide whether the Regulation applies to private causes of action, or whether the Regulation defines the scope of protection to a trademark owner under §526. *Kmart* also did not reject the holding in *Vivitar* that a private cause of action exists under §526 even though *Vivitar* was a reason for granting *certiorari* in *Kmart*. As explained above, *Kmart* simply never addressed this compelling issue. *Kmart* only concerned itself with the reasonableness of Customs' enforcement. Therefore, *Kmart* did not resolve the conflict between the Ninth Circuit's decision here, *Bourjois* and *Vivitar*.

ABC's claim that *Bourjois* has been limited to instances where the foreign manufacturer and U.S. trademark owner were independent companies is unfounded. Nothing in the *Bourjois* case suggests the nature of the relationship between the parties therein. Furthermore, counsel for Yamaha has studied the papers submitted in *Bourjois* and from them the ownership of *Bourjois*

cannot be determined. *Bourjois*, therefore, affirms the territoriality of trademarks as set forth in the Paris Convention, and is directly applicable to this case.

ABC's statement on page 16 of its Brief that *Lever Bros. Co. v. United States*, 877 F.2d 101 (D.C. Cir. 1989) and *Original Appalachian Artworks, Inc. v. Granada Electronics, Inc.*, 816 F.2d 68 (2d Cir.), *cert. denied*, 484 U.S. 487 (1987), are in harmony with the Ninth Circuit's decision here and in *NEC* is incorrect. *Original Appalachian* explicitly found that gray marketing constituted trademark infringement, and held that the Regulation did not preclude a private cause of action under §32 of the Trademark Act for trademark infringement. The Third Circuit in *Weil Ceramics and Glass, Inc. v. Dash*, 878 F.2d 659 (3d Cir. 1989), and the Ninth Circuit here found otherwise. *Lever* did not find, as did Ninth Circuit, that the relationship between the parties controlled entitlement to relief under §42.

ABC's statement on pages 17 and 18 of its Brief that the Ninth Circuit's decision here is in harmony with *Olympus* is incorrect. *Olympus* explicitly stated that a private cause of action under §526 existed regardless of the Regulation. The Ninth Circuit's own decision in *NEC*, at footnote 4, raised this as a possibility. Here, the Ninth Circuit relied on the Regulation to override the plain language of §526 and deny Yamaha a private cause of action. Therefore, conflicts exist between the Ninth Circuit's decision below and decisions of this Court and other Circuits.

CONCLUSION

For the foregoing reasons, Yamaha respectfully requests that this Court grant *certiorari* and review the Ninth Circuit's decision.

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